Supreme Court, U.S.
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No. 98-1579

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

BMC INDUSTRIES, INC.,

Petitioner,

v.

BARTH INDUSTRIES, INC., Nesco, Inc., f/k/a Nesco Management, Inc., Barth Industries Co. Limited Partnership, BIC Corporation, Nesco Holdings, Inc., f/k/a Nesco, Inc.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENT BARTH INDUSTRIES, INC.

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LIST OF PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES OF EACH OF THE CORPORATE FILERS PURSUANT TO SUPREME COURT RULE 29.6

Barth Industries, Inc. ("Barth"), is the only corporate respondent in this proceeding.[1] Barth was reorganized, subsequent to the inception of this litigation in 1989, and is now known as Barth Industries Co., L.P., a Delaware limited partnership. It is owned by its general partner, BIC Corporation (1%), and its limited partner, NES Group, Inc. (99%), which was formerly known as Nesco Holdings, Inc. and as Nesco, Inc. Barth has no nonwholly owned subsidiaries.

Petitioner BMC Industries, Inc., has separately identified relevant information pursuant to Supreme Court Rule 29.6 (Petition at ii), and that information is not repeated here.

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1. The Eleventh Circuit decision brought for review has directed that judgment be entered in favor of Nesco Holdings, Inc. ("Nesco") on grounds unrelated to and independent of the issue on which BMC Industries, Inc. ("BMC") has sought review (Petition App. A at 39a). That decision of the Eleventh Circuit is now final. Inasmuch as Nesco is no longer exposed to liability in BMC's lawsuit or a party to the lawsuit, it takes no part in this certiorari proceeding. The other respondents named in the caption of the case are similarly not before the Court, as they were voluntarily dismissed by BMC prior to the district court's judgment and were not parties to the Eleventh Circuit proceeding. *BMC Industries, Inc. v. Barth Industries, Inc.*, 160 F.3d 1322, 1324-25 n.2 (11th Cir. 1998).

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Appendix B — Opinion Of The United States Court Of Appeals For The Eleventh Circuit Denying Petition For Rehearing Dated And Filed December 30, 1998 ..... 34a

Respondent Barth Industries, Inc. ("Barth") files this brief in opposition to the petition for writ of certiorari filed by BMC Industries, Inc. ("BMC").

BMC has asked the Court to review the decision of the Eleventh Circuit Court of Appeals in *BMC Industries, Inc. v. Barth Industries, Inc.*, 160 F.3d 1322 (11th Cir. 1998), so that the Court can then order the case remanded to the Eleventh Circuit to provide that court with the opportunity to "reconsider" its decision not to certify a state law question in the case to the Supreme Court of Florida. (Petition at 16). Barth respectfully suggests that BMC's petition provides no "compelling" reason for the Court to exercise its certiorari jurisdiction authority, as required by the Court's Rule 10. The Court should decline to grant certiorari merely to direct the Eleventh Circuit to re-exercise its discretion to consider invoking a Florida certification procedure, when the court has already considered certification at BMC's request and declined to do so.[2]

BMC has argued to the Court that the decision of the Eleventh Circuit with regard to the requirement of "reliance" for waiver of a contract deadline under a Florida statute differs from the result reached in *Wisconsin Knife Works v. National Metal Crafters*, 781 F.2d 1280 (7th Cir. 1986) — a decision addressing the requirement of reliance under Wisconsin law which was rendered by a panel majority of the Seventh Circuit Court of Appeals.[3] BMC asserts that the Eleventh Circuit's

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2. Attached as Appendices A and B to this brief in opposition are copies of BMC's petition for rehearing in the Eleventh Circuit, in which certification to the Supreme Court of Florida was sought (App. A at 15a), and the court's denial of the petition (App. B at 34a-35a).

3. Petitioner also argues conflict with an unpublished table decision of a majority panel of the Fourth Circuit Court of Appeals (Cont'd)

decision on the issue of waiver has created "intercircuit conflict" (Petition at 6, 12), and argues that if only the Eleventh Circuit would use Florida's certification procedure then the Florida Supreme Court would have an opportunity to agree with the Seventh Circuit's majority. There are several reasons that the Court should decline BMC's invitation to grant certiorari.

REASONS FOR DENYING THE WRIT

A. There is no intercircuit conflict.

There is no inter-circuit decisional conflict such as would warrant the Court's attention. Rule 10(a) suggests the types of "conflict" among the United States courts of appeals which might merit consideration by the Court, and it is significant that BMC makes no effort to bring itself within the ambit of the Rule.[4] BMC has only asked that the Court intercede so that the trial courts and the intermediate appellate courts of Florida can hear from the Florida Supreme Court, rather than have to consider what the Eleventh Circuit has opined, and so that the federal courts in the Eleventh Circuit will not be bound regarding the state law issue of whether Florida's

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(Cont'd)
interpreting Georgia law, *Flowers Ginning Co., Inc. v. Arma, Inc.*, 106 F.3d 390 (4th Cir. 1997). Citations to such unpublished dispositions are disfavored even within that circuit. *See* 4th Cir. L.R. 36(c). The decision has no effect on the arguments contained herein, even if it is considered by the Court.

4. BMC has not suggested that the Court should resolve the conflict between the circuits, nor can it: the *BMC Industries* case and *Wisconsin Knife Works* are premised on the statutes of different states. No federal question is posed by these cases.

commercial contract statute requires reliance for the waiver of a contract provision. (Petition at 9). BMC's purported concern for Florida's lower courts provides no compelling reason for the Court's exercise of its discretionary certiorari jurisdiction.

B. There is no unresolved question of state law for which certification would be appropriate.

The issue of "reliance" as a requisite for waiver of a contract term was not an unresolved question of Florida law on which the Eleventh Circuit opined as a matter of first impression. The court identified and followed existing Florida precedent on precisely that point, stating:

> At least one Florida court implicitly agrees with this conclusion; in *Linear Corp. v. Standard Hardware Co.*, 423 So. 2d 966 (Fla. 1st DCA 1982), the court held that a contract term had been waived despite the absence of any facts showing detrimental reliance.

(Petition App. A at 24a). The court went on to analyze the *Linear* decision, concluding that the Florida appellate court "implicitly held that a contract term could be waived without the existence of detrimental reliance by the non-waiving party." (Petition App. A at 25a). By identifying and following a construction of a Florida statute by one of Florida's district courts of appeal, the Eleventh Circuit eliminated any reason to invoke the certification process. Indeed,

> [W]here the applicable state law is clear, certification is inappropriate; it is not a procedure by which federal courts may abdicate their

> responsibility to decide a legal issue when the relevant sources of state law available to it provide a discernible path for the court to follow.

Tidler v. Eli Lilly and Company, 851 F.2d 418, 426 (D.C. Cir. 1988).

It is not, of course, inappropriate for the Eleventh Circuit to have relied on a decision of a Florida intermediate appeal court. Federal courts often look to the decisions of state courts other than those of the state's highest court. *West v. American Telephone & Telegraph Co.*, 311 U.S. 223, 236-37 (1940); *accord Huron Holding Corporation v. Lincoln Mine Operating Co.*, 312 U.S. 183, 188 n.7 (1941). As the Court observed in *West*:

> A state is not without law save as its highest court has declared it. . . . State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it . . . however much the state rule may have departed from prior decisions of the federal courts.
>
> Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.

West, 311 U.S. at 236-37.

Moreover, the decision on which the Eleventh Circuit relied was not just persuasive authority to consider; it was binding precedent throughout Florida. The decisions of the Florida district courts of appeal represent the law of Florida unless and until they are overruled by the Florida Supreme Court and, in the absence of interdistrict conflict, are binding on the all Florida trial courts. *Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992). The Court has recognized this precedential phenomenon in the state judicial hierarchies. *E.g.*, *Gooding v. Wilson*, 405 U.S. 518, 525, n.3 (1972) (federal courts will follow the holdings of the Court of Appeals of Georgia as to matters of Georgia law because they are binding on all trial courts in Georgia in the absence of a conflicting decision of the Supreme Court of Georgia).

The *Linear* decision was the first and only appellate decision in Florida involving detrimental reliance as an element of waiver under Section 672.209, Florida Statutes. Thus, the Eleventh Circuit was not *establishing* controlling precedent for Florida's courts, as BMC charges (Petition at 9); it was *following* controlling precedent which the Florida trial courts were already obliged to honor. *See Nash v. Florida Industrial Comm'n*, 389 U.S. 235, 237-38 n.1 (1967) (holding that Florida's district courts of appeal are courts of last resort in the state for purposes of seeking certiorari review in this Court).

The Eleventh Circuit's reliance on *Linear* is no different than the reliance that would have been required of any trial court in the state. Federal courts act in the capacity of state courts when they opine on issues of state law. *King v. Order of United Commercial Travelers of American*, 333 U.S. 153, 161 (1948). Under Florida law, the Seventh Circuit's decision in *Wisconsin Knife Works* would not have been binding on a

Florida court. *See, e.g.*, *State v. Dwyer*, 332 So. 2d 333, 335 (Fla. 1976) ("lower federal court rulings . . . are not binding on state courts"); *Standard Accident Insurance Co. v. Gavin*, 184 So. 2d 229, 231 (Fla. 1st DCA 1966), *cert. dismissed*, 196 So. 2d 440 (Fla. 1967) (declining to follow decisions of a foreign jurisdiction where Florida precedent is to the contrary). Consequently, *Wisconsin Knife Works* should not have been binding on the Eleventh Circuit even if it had been inclined to follow it, in light of the contrary decision in *Linear*.

C. The decisions of the Court provide no basis to support a grant of certiorari simply to force the Eleventh Circuit to reconsider certification to the Florida Supreme Court.

BMC has argued that decisions of the Court indicate a preference for federal appellate courts to use state certification processes to resolve issues of state law. BMC's reference to select comments in certification decisions from the Court is unconvincing.

BMC references *Leavitt v. Jane L.*, 518 U.S. 137 (1996), for the proposition that the Court will not turn a blind eye to a federal court's state law determination which is plainly wrong. (Petition at 13-14). That is not precisely what the Court held. It started with the proposition that certiorari petitions are not normally granted to review what purports to be an application of state law, and it then held that the Court will review decisions "where the alternative is allowing blatant federal-court nullification of state law." 518 U.S. at 144-45. The Eleventh Circuit, however, did not nullify Florida law in this case; as noted, it *followed* Florida precedent.

BMC also references *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974), as reflecting the Court's strong endorsement

of certification as a process to have "a state court first address an important, yet unclear question." (Petition at 13). *Lehman* actually held, in a situation involving ***no*** Florida case on the issue, that certification is not an obligatory process, that its use in any given case "rests in the sound discretion of the federal court," but that certification is particularly appropriate where federal judges in New York are attempting to predict uncertain Florida law because they are " 'outsiders,' lacking the common exposure to local law which comes from sitting in the jurisdiction." 416 U.S. at 391. The distinctions between *Lehman* and this case are obvious: the judges of the Eleventh Circuit are not outsiders; the Eleventh Circuit has already been asked to exercise its discretion and declined to do so; and the issue of reliance for a waiver of contract terms was *not* unsettled in Florida.

Perspective on the certification process is provided by Chief Justice Rehnquist's concurring opinion in *Lehman*:

> If a district court or court of appeals believes that it can resolve an issue of state law with available research materials already at hand, and makes the effort to do so, its determination should not be disturbed simply because the certification procedure existed but was not used.

Lehman, 416 U.S. at 395 (Rehnquist, J., concurring).

D. There is no important legal issue at stake.

The Eleventh Circuit's decision that detrimental reliance is not a requirement for waiver of a contract provision under Florida law does not, as BMC states, involve "a point of law adversely impacting business transactions in Florida."

(Petition at 9). The court's decision is completely neutral, like every other provision in the Uniform Commercial Code. The presence or absence of required reliance for waiver merely sets the rule for waivers by which commercial enterprises can govern their conduct.

BMC over-dramatizes the alleged effect of the Eleventh Circuit's decision on "interstate and international commercial transactions in a major trade center" by asserting that the court adopted a minority position on the issue of detrimental reliance for contract waiver, allegedly contrary to what the drafters of the UCC had intended. (Petition at 12). BMC is mistaken. The fact is there is neither a majority nor a minority view on the point for, as noted by Judge Posner in the *Wisconsin Knife Works* decision, cases throughout the country are simply "diverse in outlook." 781 F.2d at 1288. That diversity in views offers no reason for the Court to exercise its jurisdiction in order to push the Eleventh Circuit to request that the Florida Supreme Court be given the opportunity to align itself with a view which will benefit BMC in this litigation.

E. Certification would hinder rather than advance the resolution of this lawsuit.

The Eleventh Circuit has recognized that it will sometimes decide questions of state law even when there is doubt as to how a state court would resolve the issue, without recourse to certification. *Escareno v. Noltina Crucible and Refractory Corporation*, 139 F.3d 1456, 1461 (11th Cir. 1998). State courts, like their federal counterparts, are busy institutions, with their own caseloads to manage. *Id.* The Chief Justice has recognized, in considering certification of an issue to the Florida Supreme Court, that delay and expense are factors to be taken into account.

> While certification may engender less delay and create fewer additional expenses for litigants than would abstention, it entails more delay and expense than would an ordinary decision of the state question on the merits by the federal court. The Supreme Court of Florida has promulgated an appellate rule [now Rule 9.150] which provides that upon certification by a federal court to that court, the parties shall file briefs there according to a specified briefing schedule, that oral argument may be granted upon application, and that the parties shall pay the costs of the certification. Thus while the certification procedure is more likely to produce the correct determination of state law, additional time and money are required to achieve such a determination.

Lehman, 416 U.S. at 394-95 (Rehnquist, J., concurring). Delay and further expense are significant factors here.

BMC's lawsuit against Barth began in 1989. It did not reach the Eleventh Circuit until 1995, and under the best of circumstances a decision by the Florida Supreme Court (duplicating the judicial labor already expended by the Eleventh Circuit) could not be expected until well into the year 2000. *See, e.g.*, *State of Florida ex. rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 275 (5th Cir.) ("[t]he experience in our Circuit has been that the process requires a period approaching one year at the least — sometimes much more"), *cert. denied*, 425 U.S. 930, *cert. denied*, 429 U.S. 829 (1976). The prospect of a decision coming two and one half years after the filing of the complaint was considered by the Fifth Circuit as "particularly significant" in evaluating certification to the Florida Supreme Court. *Exxon*, 526 F.2d at 275-76. The legal

issue that troubles BMC is not so uncertain, so unsettled, or so significant to national and international commerce that this contract dispute should be maintained in judicial limbo well beyond the passage of a decade.

Running through BMC's brief is the notion that the Eleventh Circuit wrongly decided the issue of detrimental reliance as an interpretation of the Uniform Commercial Code. The Court has traditionally shown great deference to the decisions of federal courts of appeal on state law questions, unless their conclusions are shown to be unreasonable. *Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983); *Propper v. Clark*, 337 U.S. 472, 486-87 (1949). The Eleventh Circuit's decision to follow the only Florida precedent on the issue, the *Linear* decision of Florida's First District Court of Appeal, was eminently reasonable.[5]

F. Certification is not appropriate whenever federal courts interpret issues of state law.

The establishment of a certification procedure by the State of Florida does not mean that the Florida Supreme Court wants to be consulted whenever an unresolved matter of Florida law comes before the Eleventh Circuit, as BMC suggests (Petition at 7). BMC overstates the role of certification in Florida. Indeed, the Florida Supreme Court "may," but need not, accept any question certified from a federal appellate court; it has discretion to decline consideration. *See* Art. V, § 3(b)(6), Fla. Const.; Section 25.031, Fla. Stat. (1998); Fla. R. App. P. 9.150(a). (Petition at 3-5).

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5. Judge Easterbrook dissented in *Wisconsin Knife* for the reasons expressed in the decision of the Eleventh Circuit.

The Florida Supreme Court has noted that a litigant faced with an unsettled question of state law has choices. It can have the issue resolved in the federal proceeding it initiated, request certification where available (which the federal court may or may not choose to provide), or seek a stay in the federal district court proceeding and pursue a declaratory action in the state courts. *Mobil Oil Corp. v. Shevin*, 354 So. 2d 372, 376 (Fla. 1977).

BMC chose to bring this diversity action in federal court. It was only after it received an unfavorable ruling from the Eleventh Circuit that a state court determination of legal issue is being sought. While there is nothing to bar BMC from suggesting the desirability of certification, as it already has done unsuccessfully, a state high court is justified in carefully considering a request from a party who chose to invoke federal jurisdiction in the first place. *See, e.g., Cantwell v. University of Massachusetts*, 551 F.2d 879, 880 (1st Cir. 1977):

> [T]he bar should take notice that one who chooses the federal courts in diversity actions is in a peculiarly poor position to seek certification. We do not look favorably, either on trying to take two bites at the cherry by applying to the state court after failing to persuade the federal court, or on duplicating judicial effort.

The First Circuit observed in *Cantwell* that "two bite" skepticism is particularly appropriate when it appears that certification is not sought to resolve unsettled state law, but only to afford the state court an opportunity to change existing state law. *Id.* That, of course, is precisely the situation here.

BMC elected to be in federal court. In declining certification, the Eleventh Circuit may well have considered

that BMC should be bound by its own tactical decision since it knowingly sought a federal resolution of state law contract issues. *Seaboard Surety Company v. Garrison, Webb & Stanaland, P.A.*, 823 F.2d 434, 438 (11th Cir. 1987); *Mobil Oil*, 354 So. 2d at 377.

CONCLUSION

BMC's petition for a writ of certiorari should be denied.

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